IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2807 OF 2004

Jath Taluka Shetkari Sahakari
Karkhana Ltd. .. Petitioner

Vs.

M/s.S.S.Muchandi Engineers
and Contractors and Ors. .. Respondents

Mr.S.S.Kulkarni for the petitioner

Mr.S.M.Mirajkar i/b G.S.Godbole for the respondent no. 1 to 5

CORAM : S.U.KAMDAR, J
DATED : 24TH NOVEMBER, 2005

P.C.:

1. The present proceeding is filed challenging the order passed by the Co-operative Appellate Court, Pune being an order dt.11/20.9.03 in appeal no.126 of 2003. Original application was filed by the disputant for attachment before judgment under Order 38 Rule 5 of the Civil Procedure Code before the trial court on the ground that the property should be attached as it is likely to be disposed of by the Opponent no.1 to the said suit. The learned Trial Court by order passed at Ex.H refused

to grant attachment but granted injunction restraining the original opponent from transferring, disposing of, alienating the property mentioned in para 5 of the application. The appeal was preferred therefrom by the bank being Ganesh Bank of Kurundwad Ltd., Branch Kolhapur as well as by the opponents to the said dispute. In an appeal after considering the arguments of the parties the learned Judge has come to the conclusion that there is a valid mortgage of the property in favour of the bank. I am also informed that the bank has also produced the recovery certificate issued by the Debt Recovery Tribunal in an original application no.84, 85 and 86 of 2004 by which the decree has been passed in their favour against original opponent. The learned Appellate Court has rejected the contention of the petitioner on the ground that once there is a valid mortgage in favour of the bank, the bank has prior charge against the petitioners herein who are merely unsecured creditor. It is further held that the sale by the decree holder of the assets and /or properties do not amount to disposing off the properties to defeat the decree which may be passed

in favour of the petitioner. In that light of the aforesaid, the appellate court has vacated the order of injunction granted by the trial court.The learned counsel for the petitioners has assailed the aforesaid finding on the ground that the petitioners are entitled to attachment and/or atleast injunction to protect his interest in the said suit and to protect the decree if any, passed in his favour. I am of the opinion that even if decree is passed in favour of the petitioner still by virtue of mortgage in favour of the bank they will have first charge and the petitioner will be entitled to residual amount only.

2. I am of the further opinion that the disposing of the assets by decree holder cannot be termed as sale and / or disposing of the property with a view to defeat the likely decree may be passed in favour of the petitioner. In my opinion, the ground for attachment before judgement or injunction has been made out by the petitioner. In that light of the matter, I do not find any substance in the present Writ Petition. Petition fails and the same is dismissed accordingly. No

order as to costs.